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PS Form 3800, June 1990

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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DENVER, CO 80202-2466

<http://www.epa.gov/region08>

479267

Ref: ENF-L

September 6, 2000

**BY CERTIFIED MAIL**

Kenneth Lund, Esq.  
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1700 Lincoln St., Suite 4100  
Denver, CO 80203-4541

Dear Mr. Lund:

This responds to your August 23, 2000 letter to Paul Peronard in which you allege that EPA approval of the relocation of Millwork West is not required and that the UAO requires W.R. Grace to pay compensation above that required by the NCP. Contrary to the thrust of your letter, EPA approval of the relocation is required and the UAO requires that W.R. Grace pay no more compensation than that required by law. I would like to take this opportunity to clarify what appears to be your misunderstanding of the terms of the Unilateral Administrative Order, CERCLA # 8-2000-10 (the "UAO").

W.R. Grace asserts that I have "without apparent authority from the OSC, demanded we cease work on the construction for the temporary relocation buildings, even though EPA approval for this work is not required by the Work Plan or the UAO." On August 22, 2000 at 2:26 PM, Katheryn Coggon of your office left me a message indicating the following, among other things:

*"...temporary relocation of Millwork West is now looking like it was going to cost well in excess of what would be a reasonable rent."*

*"...we're viewing that as outside the scope of the NCP well beyond what would be reasonable in terms of relocating a tenant"*

*"...this call is really just to sort of let you know that what's happening, that in order to maintain anything close to the schedule, we're going to have to go ahead and go through with that deal this afternoon so that the building company can get started on digging post holes tomorrow morning and, in that case, if you, or anybody else from EPA wants to step in and alter what it is that we are obligated to do under the Unilateral Order in terms of satisfying Millwork West we'd certainly applaud that effort and absent any effort from EPA to stop that from happening we're going to have to go through with this."*



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I returned Ms. Coggon's call at 3:00 PM the same day after having conferred with the Director of EPA Region 8's Preliminary Assessment and Emergency Response Branch. The Director is the supervisor of all the On-Scene Coordinators in Region 8, including Paul Peronard. I indicated to Ms. Coggon that if W.R. Grace were to follow-through with the course of action described in her message, it would likely constitute a violation of the UAO, for EPA approval of this action was necessary before W.R. Grace proceeded. I recommended that W.R. Grace obtain such approval before implementing the relocation in order to avoid such violation. Ms. Coggon indicated that seeking approval would create a delay that would prevent compliance with the schedule. I told Ms. Coggon that the delay was of W.R. Grace's own making because there had been plenty of time for W.R. Grace to resolve this problem. W.R. Grace proceeded to seek approval on August 23<sup>rd</sup>, the same day that Ms. Coggon indicated the contractors would have to begin work, and that approval was granted by the OSC on that same day. My warning of a potential violation of the UAO was a good faith effort to give W.R. Grace the opportunity to avoid such a violation.

W.R. Grace's assertion that approval of the relocation is not called for by the UAO is simply untrue. Paragraph 3.1 of the UAO and Section 2.1 of the Statement of Work state:

" Respondent shall notify EPA and the State at least 48 hours prior to performing any Export Plant Work pursuant to the EPA-approved Work Plan." (UAO, Paragraph 3.1.)

" Operable Unit 01 is used as a fully operational lumberyard and building materials supplier. A large planer is used to finish rough cut lumber prior to bundling and shipping out by rail or truck or for sale at the lumberyard. The current business, except for the planer, shall be temporarily relocated to an appropriate commercial location in Libby. The location must be agreed to by the EPA, the City, and the current tenants. Expenses to be covered include: moving expenses (both before and after the removal), rent in excess of the tenant's current payment, and other costs in accordance with the temporary relocation requirements of 44 CFR § 220." (Statement of Work, Section 2.1.)

W.R. Grace did not provide the 48-hour advance notice that it was commencing work at the Universal Land Corporation property. While Grace indicates in its July 28, 2000 Workplan that EPA, the City and Millwork West have approved the location, Mr. Peronard has told me that such approval was conditional upon review and approval of Grace's final relocation plan and schedule. To my knowledge, the approval of both the plan and schedule was not yet accomplished at that time. In addition, all Grace Work under the UAO is subject to EPA oversight and, thus, approval. In combination, W.R. Grace's omissions preclude any opportunity for EPA to know what was happening under the UAO, to oversee such action, or to object to such action.

W.R. Grace also asserts in your August 23<sup>rd</sup> letter that it has been forced by the UAO into a situation where it must pay unreasonable sums in compensation for relocation of Millwork West. The plain language of the UAO and the Statement of Work clearly show this allegation to be unfounded. Paragraph 3 of the UAO and Section 2.1 of the Statement of Work both state that:

**“ Respondent shall retain a certified appraiser to determine values of real and personal property affected by the Work and use such appraisal to pay appropriate compensation to the owner and lessee of the Export Plant for temporary relocation and property restoration. Any such payments shall be in accordance with the temporary relocation requirements of 44 CFR § 220.”**

**As previously indicated, Section 2.1 of the Statement of Work also indicates that:**

**“ Expenses to be covered include: moving expenses (both before and after the removal), rent in excess of the tenant’s current payment, and other costs in accordance with the temporary relocation requirements of 44 CFR § 220.”**

**Pursuant to these provisions, W.R. Grace was only required to pay the minimum compensation required by law. If W.R. Grace decides to pay a higher amount, it is free to do so. W.R. Grace’s assertion that it was forced into an extortive relationship with the Universal Land Corporation and Millwork West by the Statement of Work’s requirement for tenant approval of location is specious. EPA put this requirement in the Statement of Work to ensure that the business subject to relocation would still be able to perform the same level of business in an appropriate new location. To the degree that W.R. Grace felt Millwork West was abusing this provision or that the negotiations demonstrated that the requirement was untenable, it could have petitioned EPA for a modification of the requirement pursuant to Section XI of the UAO which states:**

**“ Modifications to any plan or schedule may be made in writing by the OSC or at the OSC’s oral direction. ... If Respondent seeks permission to deviate from any approved plan or schedule, Respondent’s Project Coordinator shall submit a written request to EPA and the State for approval outlining the proposed modification and its basis.”**

**While W.R. Grace has on occasion orally complained about its difficulties with the Millwork West negotiations, it has never, prior to the above referenced call from Ms. Coggon on August 22<sup>nd</sup>, provided EPA with a request to modify that particular requirement. W.R. Grace has been, according to its own schedule, working full time on relocation for over a month, yet, by its own admission, waits until it is within a few hours of its deadline to seek EPA’s assistance. This is particularly relevant since W.R. Grace did not achieve settlement with Millworks West in the proposal dated August 10, 2000 and executed by W.R. Grace on August 15, 2000, seven days before providing an oral request for EPA intervention. The requirements of the UAO, particularly**

when combined with W.R. Grace's own inaction are not unjust. W.R. Grace's decision to pay compensation above and beyond what it believes the NCP would have required is of its own volition.

Sincerely,

A handwritten signature in cursive script, appearing to read "Matt Cohn".

Matthew Cohn  
Legal Enforcement Program

cc: Paul Peronard  
Kelcey Land  
Max Dodson  
David Cleary